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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

WM. J. LEMP BREWING COMPANY,
Petitioner,

v.

EMS BREWING COMPANY,
Respondent.

No. 634

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Seventh Circuit

and

BRIEF IN SUPPORT OF THE PETITION.

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Cases Cited.

Statutes Cited.

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WM. J. LEMP BREWING COMPANY, Petitioner, v. EMS BREWING COMPANY, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and Associate Justices:

Your petitioner, Wm. J. Lemp Brewing Company, a Missouri corporation, respectfully presents its petition for the issuance of a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit and shows to this Honorable Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

Petitioner, a Missouri corporation, filed a complaint against respondent, an Illinois corporation, in two counts, in the United States District Court for the Eastern District of Illinois to recover $750,000.00 damages alleged to have resulted from the wrongful abandonment, termination, repudiation and breach of contract (R. 2-23).

The sole basis of the jurisdiction of the federal court was diversity of citizenship (R. 2).

Petitioner alleged in its complaint that by the terms of a written contract entered into between petitioner and Central Breweries on August 25, 1939 (R. 3), which respondent had acquired by purchase on November 24, 1941 (R. 6), respondent was bound to produce and sell beer under the name of Lemp (R. 4).

It was alleged that said contract contained no provision for cancellation and was not subject to cancellation except by mutual consent or for cause (R. 7).

It was further alleged that from and after its acquisition of the contract the respondent continuously thereafter until and including February 28, 1945, manufactured, produced and sold beer under the Lemp name (R. 6).

Petitioner alleged that under date of November 30, 1944, respondent wrongfully and illegally and without cause or justification advised petitioner of its intention to abandon the name Lemp as part of its corporate title and to discontinue the use of the name Lemp in connection with beer manufactured, produced and sold by it from and after February 28, 1945; and further advised petitioner that it would consider the contract terminated as of February 28, 1945; that on December 29, 1944, respondent changed its corporate name from Lemp Brewing Company to Ems Brewing Company, and that beginning March 1, 1945, respondent discontinued the use of the name Lemp in connection with beer manufactured, produced and sold by it (R. 7).

It was alleged that the acts of the respondent in abandoning the name of Lemp as part of its corporate title, and discontinuing the manufacture, production and sale of beer under the Lemp name and refusing to pay petitioner the

amount provided in the contract on beer manufactured, produced and sold subsequent to February 28, 1945, constituted an abandonment, repudiation and breach of contract (R. 7).

In the alternative petitioner alleged in the first count that if respondent had the lawful right to terminate the contract without the consent of the petitioner, such right of termination could be exercised only upon reasonable notice and under circumstances which would fully restore the petitioner to the position it occupied at the time the contract was entered into; that the notice was not reasonable because at the time notice of termination was given there was in force Order No. 66 of the War Food Board, which made it impossible for the petitioner to engage in the manufacture, production and sale of beer; and that at the time respondent served notice of its intention to terminate the contract it had knowledge of said Order and knew that by reason thereof petitioner could make no effective use of its name and charter powers (R. 8).

In the second count petitioner alleged that respondent's cancellation, under the circumstances then existing, was not made in good faith, but with the wrongful and willful purpose and intent of impairing the value of petitioner's name and eliminating any competition on the part of the petitioner with the respondent in the manufacture, production and sale of beer (R. 9-12).

A copy of the written contract was appended to the complaint, Plaintiff's Exhibit "A" (R. 13-19).

The parties to the contract were Central Breweries, Inc. (respondent's predecessor in interest), petitioner and Wm. J. Lemp (R. 13).

From the contract it appears that Wm. J. Lemp, the fourth generation of the Lemp family which had begun

the manufacture of Lemp beer in St. Louis in 1840, had organized the petitioner as a corporation under the law of Missouri to preserve the family name in connection with the manufacture of beer; that the petitioner was the owner of the records, formulae and analyses relating to the manufacture of Lemp beer; that no corporation having a similar name could be organized or licensed to do business in Missouri without the consent of petitioner; that petitioner had reserved the use of the corporate name in Illinois and had likewise registered its name in the patent office; that the name "Lemp" was not available to Central without the consent of petitioner and Wm. J. Lemp (R. 13-14).

The contract recited that "the parties deem it to be to their mutual advantage that through their mutual cooperation and under their mutual supervision a high quality beer be manufactured and produced by First Party (Central) to be sold under a name or designation containing the name Lemp" (R. 14).

In consideration of the premises and the mutual covenants and conditions, petitioner and Wm. J. Lemp (1) warranted the truthfulness of the representations made by them (2) granted to Central the use of the name "Lemp" as part of its corporate title, (3) granted to Central the use of the name "Lemp," "Lemp Pale Lager," "Lemp Light Lager," "Lemp St. Louis," in connection with beer to be manufactured and sold by it; (4) granted such use to such others as might be approved by Central, (5) warranted that there were no other corporations in existence having the name Lemp, (6) agreed that they would not engage in the manufacture of beer without the consent of Central, (7) agreed that they would not consent to the use of said name by any one other than Central, (8) agreed that they would take all necessary action to prevent the use of the name by others, (9) agreed that they would in-

demnify Central from liability arising out of the use of the name, (10) warranted that Wm. J. Lemp had the right to organize petitioner and to sell Lemp beer, and that there were no restrictions on his right to do so (R. 14-15), (11) agreed that the records relating to the manufacture of Lemp beer would be open to inspection, examination and use by Central (R. 16-17).

Central agreed to pay petitioner "upon beer manufactured, produced and sold by it beginning November 1, 1939," royalties set forth in the Fourth Clause of the contract, and further agreed not to pay royalties to anyone else without approval of petitioner (R. 16).

Central further agreed that it would submit to its stockholders the proposal to change the corporate name to "Lemp, Inc.," or "Wm. J. Lemp Brewing Company" (R. 17).

By the sixth clause of the contract it was "understood and agreed that it is the mutual desire of all the parties hereto to produce and sell a high quality beer under the 'Lemp' name and to that end the methods of brewing, advertising and marketing the beer" were made subject to the approval of the petitioner with a provision for arbitration in the event of a difference of opinion (R. 17).

By the Eighth Clause of the contract petitioner granted to Central an option for a period of five years for the purchase of all of its assets, including the contract, and agreed that during that period it would not dispose of its assets except subject to the option. It was further agreed that all of the existing stockholders of the petitioner, as part of the consideration of the contract, would give to Central an option of five years to acquire their stock (R. 18). Appended to the contract and made a part thereof was the agreement of the stockholders by which they gave

Central an option for a period of five years to acquire their stock and by which they agreed that they would not dispose of their stock except subject to the option (R. 19).

Respondent filed an answer to the complaint (R. 24-29) consisting of certain admissions, denials and affirmative defenses.

Thereafter respondent filed a motion for judgment on the pleadings asserting that it was entitled to judgment as a matter of law upon the grounds that the complaint showed that the contract contained no termination date, and that it was therefore terminable at will (R. 30), and that the complaint showed that the contract provided for the payment of royalties to the petitioner only on beer produced, brewed or sold while respondent had the name Lemp as a part of its corporate title (R. 30-31).

There were no allegations in the complaint, answer or motion as to the place of execution of the contract or the place or places where it was to be performed. Respondent's motion for judgment was not accompanied by any affidavit and it tendered no proof as to the place of execution or the place or places of performance. The contract itself (R. 13-19) **contained no recital as to the place of its execution, and on its face did not limit performance to any one state.**

The motion for judgment on the pleadings was taken under submission by the District Court upon arguments of counsel and briefs theretofore filed (R. 33).

In the brief which it filed in the District Court petitioner contended that any ruling [illegible] District Court upon respondent's motion for judgment [illegible]uld be premature for the reason that the record did not disclose the place of execution of the contract, and that under the Illinois con-

flict of laws rule, the rights of the parties were governed by the law of the place of execution of the contract; and in this connection the petitioner made the following statement in its brief:

> "The contract does not disclose on its face the place of execution.
>
> "The complaint does not allege the place of execution; nor are there any allegations in the answer of the defendant which undertake to set forth the place of execution.
>
> "Under the pleadings, the plaintiff is at liberty to prove and expects to prove that in point of fact the contract was entered into in the City of St. Louis, Missouri.
>
> "Nothing on the face of the contract purports to limit its performance by any of the parties to any one state."

The District Court filed a Memorandum of Opinion (R. 33-35) in which it held: That the contract was complete within itself and did not admit of extraneous evidence to aid in its proper interpretation; that after five years from the time the contract went into effect, if the option provided therein was not exercised, the contract was terminable at will by either party; that the notice of termination was not only reasonable in length of time, but went beyond any requirement of the contract; that conditions which prevailed at the time the notice was given were immaterial in view of the terms of the contract; that respondent was under no obligation to continue the manufacture and sale of beer under the name of Lemp, or under a corporate name of which the name Lemp was a part; that respondent was not precluded from manufacturing and selling beer under any other name it might choose; that respondent could terminate without liability before the end of any contract year.

The District Court then ordered that the complaint be dismissed at petitioner's costs (R. 36).

The Opinion of the learned District Court makes no reference to the law of Illinois or to the law of Missouri, and does not cite decisions of any courts of Illinois, or any courts of Missouri, or any courts whatsoever.

Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and that Court, on November 5, 1947, delivered an Opinion (164 F. 2d 290) affirming the judgment (R. 52-56).

The Circuit Court of Appeals held that the contract was not ambiguous and that it was terminable at the will of either party after the five-year option period had expired (R. 55).

The Circuit Court of Appeals in taking cognizance of the petitioner's claim that the Court could not determine the law governing the interpretation of the contract until the pleadings or proof established the fact as to the place where the contract was executed (R. 55-56), said:

> "Moreover, in view of the holdings of the Missouri courts already noted, it is immaterial whether the law of Missouri or of Illinois governs the construction of the contract, and since the contract would be terminable at will under the law of either State, no question of conflict of laws is involved" (R. 56).

Petitioner in due course filed its petition for rehearing (R. 57), which was overruled by the Circuit Court of Appeals without further opinion on December 3, 1947 (R. 58).

II.

OPINIONS BELOW.

The Opinion of the District Court has not been reported. The Opinion of the Circuit Court of Appeals is reported in 164 F. 2d 290.

III.

BASIS OF THIS COURT'S JURISDICTION.

A. The date of the judgment of the Circuit Court of Appeals is November 5, 1947 (R. 57), and the date when said judgment became final, on the denial of the petitioner's motion for rehearing, was December 3, 1947 (R. 58). The date of this application for a writ of certiorari may be taken as the date of the filing of this petition in the office of the Clerk of this Court.

B. This Court has jurisdiction to review the judgment of a United States Circuit Court of Appeals under and by virtue of Section 240 (a) of the Judicial Code as amended (28 U. S. C., Section 347).

The jurisdiction of this Court is invoked under this Section and under Rule 38 (b) of the Rules of the Supreme Court of the United States.

C. The grounds upon which petitioner urges this Court to issue its writ of certiorari are:

1. Since the appropriate state law governing the construction of the contract was, under the conflict of laws rule of Illinois, the law of that state in which the contract was executed, the District Court had no power to grant respondent's motion for judgment on the pleadings in a diversity case upon a record which did not disclose the

place of execution of the contract, and it was the duty of the Circuit Court of Appeals to vacate the judgment and remand the cause.

2. In holding that it was immaterial whether the construction of the contract was governed by the law of Missouri or by the law of Illinois, the Circuit Court of Appeals did not search for and apply, as it was required to do by the decisions of this Court, the entire body of the substantive law of Missouri relating to the construction of the contract.

(a) The Circuit Court of Appeals failed to inquire into or to give effect to the law of Missouri as to the admissibility of extraneous evidence as to the intention of the parties where the contract is silent as to its duration and bottomed its conclusion that said evidence was inadmissible solely upon Illinois law.

(b) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that a continuing contract is not terminable at will where one party has received the benefit of a fully executed independent consideration.

(c) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that where a contract is terminable at will such termination cannot be effectuated except on reasonable notice and in good faith.

(d) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that reasonable notice was a question of fact to be determined by the triers of the fact.

(e) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that the obligation on the part of respondent to make Lemp beer would be implied from its acceptance of the contract.

D. Among the cases believed to sustain the jurisdiction of this Court are:

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290;

New York Life Insurance Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329;

Rosenthal v. New York Life Insurance Co., 304 U. S. 263, 82 L. Ed. 1330;

Klaxon Company v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

IV.

QUESTIONS PRESENTED.

1. Does a federal court in a diversity case have the power, in the light of Erie Railroad Co. v. Tompkins, to grant judgment on the pleadings, where the record on which the judgment is predicated affords no basis for the ascertainment of the appropriate State law governing the rights of the parties?

[The action was for breach of contract and the rights of the parties were dependent upon the construction of the contract. Under the Illinois conflict of laws rule the construction of a contract is governed by the law of the State in which it was executed, except where the contract is to be wholly performed in one State. The pleadings did not allege where the contract was executed or where it was to be performed and there was no evidence offered in support of respondent's motion as to the place of execution or the place of performance.]

2. Was it the duty of the Circuit Court of Appeals to vacate the judgment entered on such a record and remand the cause?

3. Did the Circuit Court of Appeals, in ruling that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois, give consideration and effect to the entire body of the substantive law of Missouri as it was required to by the decisions of this Court?

[The Circuit Court of Appeals held that the contract was terminable at will under the law of Missouri (R. 56).

In so doing, however, the Circuit Court of Appeals relied solely upon Illinois decisions in support of its ruling that extraneous evidence was not admissible for the purpose of ascertaining the intention of the parties (R. 54-55); and gave no consideration or effect to the Missouri law

(1) that a contract silent as to its duration is ambiguous and that extraneous evidence is admissible to resolve the ambiguity;

(2) that a contract is not terminable at will by a party who has received the benefit of an independent executed consideration;

(3) that a contract terminable at will can be terminated only on reasonable notice and in good faith;

(4) that an obligation to perform will be implied from the acceptance of the contract.]

V.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. A federal court, in a diversity case, has no power to grant judgment on the pleadings where the record is silent as to a fact which must be determined before the court can ascertain the appropriate state law.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

2. Since the construction of a contract, under the Illinois conflict of laws rule, is governed by the law of the place where the contract is made except where the contract is to be performed wholly in one state, the appropriate state law governing the rights of the parties could not be ascertained on a record which did not disclose the state in which the contract was made, or the state, if any, in which it was wholly to be performed.

Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 479, 58 N. E. 2d 460;

Reighley v. Continental Illinois National Bank, 390 Ill. 242, 248, 61 N. E. 2d 29;

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

3. Since the judgment was based upon a record which made it impossible for the District Court to apply the appropriate state law, it was the duty of the Circuit Court of Appeals to vacate the judgment and remand the cause.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

New York Life Ins. Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329;

Rosenthal v. New York Life Ins. Co., 304 U. S. 263, 82 L. Ed. 1330.

4. In determining that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois, the Circuit Court of Appeals was required to search for and apply the entire body of the substantive law of Missouri.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290.

5. Included in the body of the substantive law of Missouri which the Circuit Court of Appeals was required to search for and apply was the Missouri law as to the admissibility of extraneous evidence considered in relation to a contract that contained no express provision for termination, since the so-called "parol evidence rule" is a rule of substance and not of procedure both in the federal courts and in Illinois.

American Crystal Sugar Co. v. Nicholas (C. C. A. 10), 124 F. 2d 477, 479;

Zell v. American Seating Co. (C. C. A. 2), 138 F. 2d 641, 643;

Wooton Hotel Corp. v. Northern Assurance Co. (C. C. A. 3), 155 F. 2d 988, 990;

Berkshire Life Ins. Co. v. Jackson Realty & Management Corp., 328 Ill. App. 318, 65 N. E. 2d 578.

6. The Circuit Court of Appeals did not inquire into the Missouri law as to the admissibility of the extraneous evidence and based its conclusion that said evidence was not admissible solely on Illinois law (R. 54-55).

7. Among the important aspects of the substantive law of Missouri relating to the rights of the petitioner which the court would have been required to follow upon a finding that the contract was a Missouri contract and which were not given either consideration or effect by the Circuit Court of Appeals are the following:

(a) A contract which contains no provision for termination is ambiguous so as to permit of extraneous evidence as to the intention of the parties.

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 267, 268, 270;

Ambassador Bldg. Corp. v. St. Louis Ambassador, 238 Mo. App. 600, 185 S. W. 2d 827, 836.

(b) A party who has received the benefit of an independent additional consideration, such as the option granted by petitioners and its stockholders, cannot thereafter terminate his obligation at will.

Fullington v. Ozark Supply Co., 327 Mo. 1167, 39 S. W. 2d 780, 783;

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;

Schonwald v. Burkhart Mfg. Co. (Mo.), 202 S. W. 2d 7, 15.

(c) A contract terminable at will can be cancelled only upon reasonable notice and in good faith.

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;

Meyer Milling Co. v. Baker (Mo. App.), 10 S. W. 2d 668, 670, reversed on other grounds, 328 Mo. 1246, 43 S. W. 2d 794;

Clarkson v. Standard Brass Mfg. Co., 237 Mo. App. 1018, 170 S. W. 2d 407, 415.

(d) By accepting a contract and entering into a performance a party assumes the obligation of performance.

Beebe v. Columbia Axle Co., 233 Mo. App. 212, 117 S. W. 2d 624, 631.

8. Since this Court in Erie Railroad Co. v. Tompkins ruled that a federal court has no constitutional power to decide questions of substantive law in diversity cases ex-

cept in accordance with the appropriate state law, a departure from the course charted by this Court is per se an encroachment upon the right of a litigant to have his case determined in accordance with the federal constitution. This Court therefore may consider whether this constitutional right has been denied in substance and effect though not in express terms.

Oyama v. State of California, 92 L. Ed. 257 (Adv. Opinions).

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 9312, Wm. J. Lemp Brewing Company, Plaintiff-Appellant, v. Ems Brewing Company, Defendant-Appellee," and that said judgment may be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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v.

EMS BREWING COMPANY,
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No. .....

BRIEF IN SUPPORT OF PETITION.

I.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition, and is, therefore, not repeated here.

II.

STATEMENT OF THE CASE.

A statement containing all that is deemed material to the questions presented appears in the petition under the heading "Statement of the Matter Involved," to which reference is hereby made.

III.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in each of the following respects:

1. In failing to vacate the judgment and remand the case for the reason that the record did not provide a basis for the ascertainment of the appropriate State law.

2. In failing to vacate the judgment and remand the case for the reason that the District Court could not find and did not find the appropriate State law.

3. In ruling that it was immaterial whether the rights of the parties were governed by the law of Missouri or by the law of Illinois.

4. In ruling that there was no question of conflict between the law of Missouri and the law of Illinois.

5. In applying the law of Illinois as to the admissibility of extraneous evidence as to the intention of the parties to the contract.

6. In failing to search for and apply the law of Missouri as to the admissibility of extraneous evidence.

7. In failing to give consideration and effect to the entire body of the substantive law of Missouri.

8. In failing to give consideration and effect to the law of Missouri in the following particulars:

> (a) That a party who receives in connection with a continuing contract the benefit of an independent additional consideration is not permitted to abandon the contract at will.

(b) That a contract terminable at will can be terminated only upon reasonable notice and in good faith.

(c) That an obligation to perform will be implied from a party's acceptances of a contract.

9. In ruling that respondent was entitled to judgment upon the pleadings under the law of Missouri.

10. In ruling that the complaint failed to state a claim entitling petitioner to relief under the law of Missouri.

IV.

ARGUMENT.

I.

The affirmance, in a diversity case, of a judgment on the pleadings based upon a record which provided the District Court no basis for the ascertainment of the appropriate State law is incompatible with the doctrine of Erie Railroad Co. v. Tompkins.

The considerations which moved this Court in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, to overrule Swift v. Tyson, 16 Pet. 1, were fundamental in their nature as is made clear by the following excerpt from the Opinion (304 U. S. 77, 78):

> "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.
>
> "* * * Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State, and whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature, or 'general,' be they commercial law or part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts * * *."

It follows that a departure from the mode of decision prescribed in diversity cases by the Erie case involves

more than a transgression of procedural rules; such a departure invades the rights of the parties, under the Federal Constitution, to a judgment of the federal court reached through, and only through, the ascertainment and application of the appropriate State law.

The "appropriate" State law is not necessarily the law of the State in which the federal court is located since by the conflict of laws rule of that State the rights of the parties may be governed by the law of another State.

Williams v. Green Bay, 326 U. S. 549, 90 L. Ed. 311;
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;
Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

The rights of the petitioner in the case at bar were founded upon a contract. Petitioner had alleged that by the terms of the contract respondent was obligated to manufacture and sell beer under the name of "Lemp"; that petitioner had wrongfully discontinued the manufacture and sale of "Lemp beer"; that the contract was not subject to termination at will; that if it were subject to termination at will, such termination could be effectuated only upon reasonable notice and in good faith; that the notice of termination given by respondent was not reasonable, and that respondent had not terminated in good faith (R. 2-231).

Respondent moved for judgment on the pleadings asserting that as "a matter of law" it had the right to terminate without liability and regardless of the reasonableness of the notice of termination or the existence of good faith (R. 30-31).

Since this was a diversity case, and since there is no federal general common law, the only "law" upon which the respondent was entitled to rely as the basis of its claim

to judgment was necessarily the appropriate State law ascertained as required by the decisions of this Court.

The appropriate **State**, the law of which would govern the construction, interpretation and effect of the contract, would be the State the law of which was made applicable by the conflict of laws rule of Illinois where the federal court was located.

The Circuit Court of Appeals cites George v. Haas, 311 Ill. 382, 143 N. E. 54, in support of the statement in its Opinion that parties are presumed to contract with reference to the law of the State where the contract is to be performed (R. 56).

The prevailing rule in Illinois is set forth in Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 58 N. E. 2d 460, l. c. 462, as follows:

> "From the record before us, it is plain that the agreement itself makes no provision or provisions as to the State or States wherein the services were to be performed and that no intention is to be gathered from the agreement or proof that the contract was to be wholly performed within the State of Illinois. * * * To bring the rule announced in George v. Haas, 311 Ill. 382, 385, 143 N. E. 54 (the case relied on by the Circuit Court of Appeals) **into operation**, it was incumbent upon appellant to show that the agreement was to be **wholly** performed within this state. Where a contract is to be performed in **various** states, as in this case, the lex loci contractus must control. Otherwise if the law of the place of performance is to govern the law would find itself in a hopeless tangle.
>
> "* * * **Where there is nothing in the contract or in the proof to show where the contract is to be performed, it is governed by the law of the place where made.**" (Emphasis ours.)

It is clearly apparent that the effect of George v. Haas, 311 Ill. 383, has been limited by the Supreme Court of Illinois to a situation in which the contract is to be wholly performed within a single state. In fact the situation before the Supreme Court in George v. Haas involved performance at one place only for there the Court had under consideration the effect to be given as to the interest legally chargeable on a note which by its express terms was payable at the Isle of Pines.

And in Reighley v. Continental Illinois National Bank, 390 Ill. 242, 61 N. E. 2d 29, l. c. 32, the Supreme Court of Illinois held that it would be presumed that where a contract did not specify the place of performance it was to be performed at the place where made.

The appropriate state law governing the rights and obligations of the petitioner and the respondent would therefore be the law of the State where the contract was executed, or the law of the State where the contract was to be performed, **if the performance was confined to one single state.**

Respondent claimed it was entitled to judgment as a matter of law **upon the pleadings** (R. 30-31). Before the District Court could ascertain the appropriate State law it would be necessary for it to determine **from the pleadings** the State in which the contract was executed or the State, if any, in which the contract was to be **wholly** performed.

The pleadings on the basis of which the respondent sought favorable affirmative action by the District Court consisted of the complaint (R. 2-23) and the answer (R. 24-29).

Neither the complaint nor the answer sets out any allegation as to the **place** of execution of the contract; neither

alleges nor avers that the contract is to be performed wholly within one state.

Respondent's motion for judgment contains no statements as to the place of execution or place of performance. No affidavit or other evidence in support of the motion was proffered.

The contract itself attached to the complaint as Plaintiff's Exhibit "A" (R. 13-19), contains no recitals as to the place of execution or as to the place of performance. The fact that petitioner by the contract gave up its exclusive right to the use of the corporate name in both Missouri and Illinois, that it disclosed its formulae and granted to respondent the use thereof, that it conferred upon respondent the right to make and sell beer without any limitation as to place, and the fact that it undertook to refrain from making beer without any limitation as to place, negative any inference that the contract was to be wholly performed in a single state.

The petitioner contended in the District Court that the appropriate state law could not be ascertained upon the pleadings, and that therefore the District Court not rule upon the questions of law involved in the respondent's motion for judgment in the manner directed by this Court in Erie v. Tompkins, and in that connection petitioner advised the District Court that it was at liberty to prove and expected to prove that the contract was executed in Missouri.

Petitioner had endorsed on its complaint a request for a trial by jury (R. 12) and by virtue of said request was entitled to the finding of the jury as to the place of execution of the contract.

But whether this question of fact was to be determined by the jury or by the District Court on a preliminary hear-

ing, we respectfully submit that until this question of fact had been resolved it was impossible for the District Court to discharge the duty, clearly prescribed by this Court, of ascertaining the appropriate State law.

In its Opinion the District Court disposed of the Motion for Judgment without reference to any specific law or without comment as to the local law of Illinois, the conflict of laws rule of Illinois, or the local law of Missouri, and without any finding of fact as to the place of execution of the contract or the place of performance thereof (R. 33-35).

The record before the Circuit Court of Appeals disclosed on its face that the District Court could not have granted respondent's motion for judgment on the basis of the appropriate State law since the record was lacking in an essential prerequisite to the ascertainment of the appropriate State law, to-wit, the fact as to the place of execution of the contract.

If, as this Court has held in the Erie case, a federal court is limited in its decision of questions of substantive law in diversity cases to the confines of the appropriate state law, the act of the District Court in undertaking to rule upon questions of substantive law under circumstances which afforded no basis for the ascertainment of the appropriate state law was in excess of the jurisdictional power vested in it.

The record in the case at bar is not one in which the only question involved was whether or not the District Court erred in its view as to the appropriate State law, but presented a situation where it was impossible for the District Court to ascertain the appropriate State law.

It was therefore the duty of the Circuit Court of Appeals to vacate the judgment and to remand the cause.

This Court does not undertake initially to determine whether the result would be the same if the appropriate State law had been ascertained and applied. It refused specifically to follow such a course in Rosenthal v. New York Life Ins. Co., 304 U. S. 263, 264, 82 L. Ed. 1330, 1331, wherein this Court said:

> "While respondent contends that the decision below is not in conflict with local law it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court."

The dictate of Erie v. Tompkins is simple, direct and unequivocal. It affords no latitude for an "either-or" basis of decision in the District Court initially or in the Circuit Court of Appeals on appeal.

In the case at bar the attention of the District Court in the first instance and the Circuit Court of Appeals on appeal would have been limited and circumscribed to a careful and detailed consideration of Missouri law if the triers of fact had found that the contract was a Missouri contract; conversely it would have been concentrated on the Illinois law if the triers of fact had found that the contract was an Illinois contract.

Moreover the petitioner was entitled to have the benefit of the District Court's judgment as to the Missouri law if the facts disclosed that the contract was a Missouri contract.

The failure of the Circuit Court of Appeals to vacate the judgment is so far a departure from the principles declared by this Court in the Erie case as to warrant the issuance of the writ of certiorari as prayed.

II.

The Circuit Court of Appeals, in holding that there was no conflict between the law of Missouri and the law of Illinois failed to search for and apply the entire body of the substantive law of Missouri as it was required to do by the decisions of this Court.

Notwithstanding the fact that the case was not, and could not have been, decided in the District Court in the manner required by this Court, the Circuit Court of Appeals affirmed the judgment on the ground that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois.

If the Circuit Court of Appeals had the power to sanction the failure of the District Court to follow the course charted for it by this Court in Erie Railroad Co. v. Tompkins upon the ground that the same result would have followed if the appropriate State law was the law of Missouri, it was under the obligation to search for and apply the whole of the Missouri substantive law in the course of reaching its conclusion.

This is made clear by the decision of this Court in Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 208-209, 82 L. Ed. 1290, l. c. 1294, where it was said:

> "Application of the 'State law' to the present case, or any other controversy controlled by Erie Railroad Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the federal courts must search for and apply the **entire body of substantive law** governing an identical action in the state courts." (Emphasis ours.)

The interpretation of the contract and the rights of the parties could not be determined **in part** by the substantive

law of **Illinois** and **in part** by the substantive law of **Missouri.**

In order to reach the conclusion that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois the Circuit Court of Appeals had to assume that the proof would show, as petitioner contended, that the contract was executed in Missouri and that it was not to be wholly performed in Illinois.

This hypothesis required a minute and careful consideration of every aspect of the substantive law of Missouri material to the controversy.

One of the most material questions of law involved was whether or not a contract which is silent as to its duration is ambiguous or incomplete so as to permit proof of the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and its interpretation by the parties for the purpose of ascertaining the intention of the parties as to the duration of the contract.

The Circuit Court of Appeals held that such evidence was not admissible upon the ground that the contract was free from ambiguity (R. 54-55). In so doing, however, the Circuit Court of Appeals referred only to **Illinois** law and gave no consideration to the Missouri law (R. 54-55).

The admissibility of evidence under the so-called "parol evidence rule," however, is a matter of **substantive** law, as distinguished from procedural law and upon the hypothesis that the contract was a Missouri contract, the question as to the admissibility of such evidence was to be decided in accordance with Missouri law.

American Crystal Sugar Co. v. Nicholas (C. C. A. 10), 124 F. 2d 477, 479;

Zell v. American Seating Co. (C. C. A. 2), 138 F. 2d 641, 643;
Wooton Hotel Corp. v. Northern Assurance Co. (C. C. A. 3), 155 F. 2d 988, 990.

In American Crystal Sugar Co. v. Nicholas, supra, the Circuit Court of Appeals for the Tenth Circuit said (124 F. 2d 477, l. c. 479):

> "The (parol evidence) rule is in no sense a rule of evidence but one of substantive law. The contract was made in Utah and so far as the transfer of stock was concerned was to be performed in that state. Hence, the law of Utah governs the rule, its application and its limitations."

The application of the Illinois parol evidence rule by the Circuit Court of Appeals to a contract which by hypothesis is a Missouri contract, is in conflict with the decisions of the Second, Third and Tenth Circuits above cited.

If, as was suggested by the Second Circuit in Zell v. American Seating Co., 138 F. 2d 641, 643, the question as to whether the parol evidence rule is substantive is to be decided by the conflict of laws rule of the State in which the federal court is located, the Circuit Court of Appeals was likewise required to apply the Missouri law, since in Illinois the parol evidence rule is held to be a matter of substantive law.

Berkshire Life Ins. Co. v. Jackson Realty & Management Corp., 328 Ill. App. 318, 65 N. E. 2d 578, Headnote 5.

While it is true, as the Circuit Court of Appeals stated in its Opinion that "the object of construction is to ascertain the intention which the parties have expressed in the language of their contract and where there is no am-

biguity in the terms, the instrument itself is the only criterion of the intention of the parties" (R. 54), the real question to be determined was whether or not a contract which failed to specify the period of its duration was or was not ambiguous.

Many distinguished courts have held, contrary to the view of the Circuit Court of Appeals, that where a contract fails to specify its duration an **ambiguity** exists permitting proof of the intention of the parties by extrinsic evidence.

American Type Founders, Inc., v. Lanston (CCA 3), 137 F. 2d 728;

Miss. River Logging Co. v. Robson (CCA 8), 69 Fed. 773;

Miller v. Miller (CCA 10), 134 F. 2d 583;

Coca Cola Bottling Co. v. Coca Cola (D. C. Del.), 269 F. 796.

At least two distinguished federal courts have held that a contract not limited in time is **presumably** perpetual in the obligation it imposes except when the contract is for personal services.

Manners v. Morosco (CCA 2), 258 F. 557, 558, 559;

Western Union Tel. Co. v. Penn. Co. (CCA 3), 129 F. 849, 861.

Since by hypothesis the Circuit Court of Appeals was treating the contract as a Missouri contract it should have approached this question of ambiguity, not from the point of view of an Illinois court, but from the point of view of a Missouri Court.

In Missouri "a contract is ambiguous when its terms are reasonably susceptible of different constructions."

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, l. c. 267.

Missouri has freed itself "from the primitive formalism which views the document as a self-contained and self-operative formula."

Ambassador Bldg. Corp. v. St. Louis Ambassador, 238 Mo. App. 600, 185 S. W. 2d 827, 836.

In Missouri it is held that:

> "For the purpose of determining the intention of the parties and reaching a construction that is fair and reasonable under all the facts and circumstances, the court may consider the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and its interpretation by the parties."

Paisley v. Lucas, 346 Mo. 827, 839, 143 S. W. 2d 262, 268;

Ambassador Bldg. Corp. v. St. Louis Ambassador, 238 Mo. App. 600, 185 S. W. 2d 827, 837.

A consideration of the Missouri law would have disclosed to the Circuit Court of Appeals that the Supreme Court of Missouri did inquire into the surrounding circumstances in determining whether a contract of agency was terminable at will.

For in Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, l. c. 270, the Supreme Court of Missouri said:

> "The language of the amendment, while evidencing a present intention not to cancel, does not indicate an express intention to confer upon appellant a perpetual right of employment. Minter v. Dry Goods, 187 Mo. App. 16, 26, 173 S. W. 4. **No such intention appears from the evidence in the record.** Considering the language used, **the subject matter of the contract and the situation of the parties,** we think the contract

was to continue only so long as it was mutually satisfactory to the parties." (Emphasis ours.)

The Circuit Court of Appeals could not disregard the Missouri law as to the admissibility of extraneous evidence and apply the Illinois law thereto if the contract was a Missouri contract, as it assumed in holding that the failure of the District Court to follow Erie v. Tompkins did not invalidate the judgment.

Other important aspects of the substantive law of Missouri highly material to the rights of the petitioner were ignored by the Circuit Court of Appeals including the following:

(a) The effect of the Missouri rule that a party who receives in connection with a continuing contract the benefit of an independent additional consideration is not permitted to abandon the contract at will.

Fullington v. Ozark Supply Co., 327 Mo. 1167, 39 S. W. 2d 780, 783;
Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;
Schonwald v. Burkhart Mfg. Co. (Mo. Sup.), 202 S. W. 2d 7, 15.

(b) The effect of the Missouri rule that a contract terminable at will can be terminated only upon reasonable notice and in good faith.

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;
Meyer Milling Co. v. Baker (Mo. App.), 10 S. W. 2d 668, 670;
Clarkson v. Standard Brass Co., 237 Mo. App. 1018, 170 S. W. 2d 407, 415.

(c) The effect of the Missouri rule that an obligation to perform will be implied from a party's acceptance of a contract.

Beebe v. Columbia Axle Co., 233 Mo. App. 212, 117 S. W. 2d 624, 631.

An exhaustive presentation of the Missouri law in the respects above set forth cannot be made within the permissible confines of a brief in support of a petition for a writ of certiorari but we desire to point out briefly the importance of the impact of the Missouri law on the rights of the petitioner.

(a) In Fullington v. Ozark Supply Co., 327 Mo. 1167, 39 S. W. 2d 780, 783, the Supreme Court of Missouri said:

> "The decision reached is founded on the obligation of the parties arising out of their mutual promises to hire and to serve for the period stated in the agreement, and supplemented by actual service. Therefore, it is not necessary for a decision of this case to determine whether the purchase by appellant from respondent of shares of its stock, to the amount of $3,000 as the petition recites, was a further valuable consideration supporting the contract, independent of the consideration of the mutual promises of the parties. **Independent or additional consideration, such as a release of a cause of action, serves to turn into constant, steady, or even lifetime employments contracts of hire which otherwise would be terminable at will by either party. Harrington v. Kansas City Cable Railway Co., 60 Mo. App. 223.**" (Emphasis ours.)

The foregoing statement was recognized as the law of Missouri in the comparatively recent case of Schonwald v. Burkhart Mfg. Co. (Mo. Sup.), 202 S. W. 2d 7, l. c. 15.

It is the generally accepted view that contracts of employment which are silent as to duration are terminable at will. In Missouri the grant of an independent additional consideration places upon the recipient of that consideration the obligation of furnishing constant employment.

Thus, if the obligation to furnish employment is based upon a consideration independent of and additional to the agreement of the employee to serve, such as the release of a cause of action or the purchase of stock, the employer who has received the benefit of the independent, additional consideration cannot abandon his obligation under the contract at will.

In the case at bar petitioner conferred upon the respondent the right to use the name "Lemp" as part of its corporate title and in connection with the manufacture of beer and the use of the Lemp formulae, records and analyses to the end that respondent could make and sell Lemp beer.

But independently of and in addition to these grants and consents, petitioner gave to respondent an option for a period of five years to purchase its assets and all the stockholders of petitioner gave to respondent an option for a period of five years to purchase their stock (R. 17, 18, 19).

Obviously these options were unrelated to the manufacture of beer in the same way that the release of a cause of action by an employee is unrelated to the services he is to perform.

If the petitioner at the time the contract was entered into had paid the respondent a million dollars in cash, it certainly could not have pocketed the money and thereafter abandoned the contract at its will. The grant of the option by the petitioner and by its stockholders was a present conveyance of a valuable property right constituting an independent, additional consideration.

It was the duty of the Circuit Court of Appeals to give consideration and effect to the Missouri law to the effect that respondent was bound to perform as long as performance was possible.

The Circuit Court of Appeals held without reference to or discussion of the Missouri law that respondent was free

to terminate at will after the expiration of the period for the exercise of the option. But there is nothing in the Missouri law which makes the **nature** and **extent** of the independent consideration relevant in a determination of the question.

(b) In the first count of its complaint petitioner pleading in the alternative had alleged that if the contract were terminable at will, such right to terminate could be exercised only upon reasonable notice, and that the notice was not reasonable (R. 8-9); and in the second count had alleged that respondent in terminating did not act in good faith (R. 9-12).

In connection with its charge that the notice was not reasonable and that good faith was lacking petitioner alleged that at the time notice of termination was given and continuously thereafter, there was in effect Order No. 66 of the War Food Administration; that under said Order malt grain and other products necessary in the manufacture of beer could not be lawfully acquired by brewers who were not actually engaged in the manufacture of beer during the base period March 1, 1942, to February 28, 1943; that petitioner was not so engaged during the base period because by its contract with respondent it had agreed not to make beer; and that during this period Lemp beer, which petitioner otherwise would have been at liberty to sell was being sold by respondent under the contract; that at the time respondent gave notice of termination it knew of said Order and knew that no quotas of malt grain, etc., would be available to petitioner (R. 8).

It was further alleged that at the time it gave notice of termination respondent knew that it would be impossible for petitioner to manufacture beer because of shortages of machinery, bottles and manpower (R. 8-9).

From the allegation of the complaint, the truth of which must be conceded, it appears that respondent was incorporated under the name "Lemp Brewing Company" on November 17, 1941 (R. 5); that at the time of its incorporation it had no right to the use of the name "Lemp," either as part of its corporate title or in connection with the manufacture of beer (R. 6); that in order to acquire these rights it purchased the contract which plaintiff had made with Central on November 24, 1941 (R. 6); that the only beer which respondent made from the time of its incorporation in November, 1941, until it abandoned the contract on February 28, 1945, was "Lemp" beer (R. 7).

It is thus clear that respondent was incorporated for the express purpose of making and selling Lemp beer under the contract, and that respondent was engaged in making beer during the base period fixed by Order 66 [March 1, 1942-February 28, 1943] as the result of rights conferred solely upon it by the contract.

Respondent's ability to receive quotas of malt grain and other ingredients under Order 66 of the War Food Board was the result of a right it had received under the contract; petitioner's inability to receive such quotas was the result of a right it had surrendered to the respondent under the contract.

It thus appears that respondent chose to give notice of termination at a time when the petitioner, as the result of regulations promulgated to advance the successful prosecution of the war, was disabled from exercising a right which it had surrendered to the respondent under the contract, although the respondent was eligible to receive quotas under the regulations as a result of the contract.

Certainly the jury which petitioner had demanded had the right to find that notice given at such a time and under

such circumstances was not reasonable, and that the termination was not in good faith.

The District Court, in its Opinion (R. 34), said "that the notice of termination given by defendant was not only reasonable in length of time but went beyond the requirements of the contract; that the economic condition of the country as affected by availability or non-availability of materials and equipment necessary for plaintiff to begin and carry on the business of manufacturing beer at the time of said notice is immaterial in view of the terms of the contract."

The Circuit Court of Appeals did not discuss or refer to the question of reasonable notice.

Neither the District Court nor the Circuit Court of Appeals undertook an examination of the Missouri law in respect to the necessity of giving reasonable notice or as to what constituted reasonable notice.

The Supreme Court of Missouri, the highest court of that State, has said that a contract for an indefinite term cancellable at will may be terminated only upon reasonable notice as appears from Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, l. c. 271, as follows:

> "We hold that appellant's contract was 'subject to cancellation' by its terms because in view of its particular provisions it was a contract for employment as general insurance agent and manager for an indefinite term and it could therefore be cancelled by either party upon **reasonable notice** to the other." (Emphasis ours.)

Two intermediate appellate courts of Missouri have similarly stated that a contract indefinite in its term can be cancelled only upon reasonable notice.

> Meyer Milling Co. v. Baker (Springfield Ct. of Appeals), 10 S. W. 2d 668, l. c. 670;

Clarkson v. Standard Brass Mfg. Co. (Kansas City Ct. of Appeals), 237 Mo. App. 1018, 170 S. W. 2d 407, l. c. 415.

Where State law is to be applied by a federal court it is the duty of the federal court to "ascertain from all the available data what the State law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

West v. American Telegraph & Telephone Co., 311 U. S. 223, l. c. 237, 85 L. Ed. 139, l. c. 144.

The ruling of the Supreme Court of Missouri that reasonable notice is necessary before there can be an effective termination of a contract for an indefinite term was binding upon the Circuit Court of Appeals if the contract was to be governed by the Missouri law and it was incumbent upon that Court to give consideration and effect to this aspect of the Missouri law.

The Springfield Court of Appeals held in Meyer Milling Co. v. Baker, 10 S. W. 2d 668, l. c. 670, that to terminate a contract indefinite as to time a party "must act in good faith." The Supreme Court of Missouri reversed the decision but on other grounds (328 Mo. 1246, 43 S. W. 2d 794).

It was the duty of the Circuit Court of Appeals to ascertain whether the decision of this intermediate appellate court was the law of Missouri and to give effect thereto if it found this to be the case.

West v. American Telegraph & Telephone Co., 311 U. S. 223, 85 L. Ed. 139;

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109;

Six Companies of California v. Joint Highway District, 311 U. S. 180, 85 L. Ed. 114.

The Circuit Court of Appeals ignored the allegations of the complaint charging respondent with bad faith (R. 12) and gave no consideration to the Missouri law as it related to the necessity of good faith in connection with the termination of the contract.

(c) The Circuit Court of Appeals held that the only thing the contract bound the respondent to do was to pay royalties based upon the sale of beer sold under the Lemp name (R. 55).

Petitioner was not seeking to recover royalties but **damages** for the breach and abandonment of the contract.

The contract recited that the "parties deem it to be to their mutual advantage that through their mutual cooperation and under their mutual supervision a high quality beer be manufactured and produced by First Part to be sold under a name or designation containing the name 'Lemp'" (R. 14) and in the covenanting portion of the contract it was "**understood** and **agreed** that it was the mutual desire of all the parties hereto to produce and sell a high quality beer under the 'Lemp' name" (R. 17).

The contract required the respondent's predecessor to submit to its stockholders a proposal to change the corporate name to "Wm. J. Lemp Brewing Co." (R. 17); the complaint alleged that Central did, in October, 1939, change its corporate name to "Wm. J. Lemp Brewing Company" (R. 4), and that beginning November 1, 1939, it began the sale of Lemp beer under its new corporate name (R. 4).

The question to be determined was whether or not by the terms of the contract, by its acceptance thereof, and by entering on the performance of the same, Central became bound to make and sell a high quality beer.

That question had to be decided upon the basis of the Missouri law if the contract were a Missouri contract.

Would a Missouri court impose an obligation on Central to manufacture and sell Lemp beer where the parties had not only recited that the very purpose which animated them in making the contract was to produce and sell a high quality beer under the Lemp name, but had "agreed and understood" that such was their mutual desire and where Central had actually begun performance?

The Kansas City Court of Appeals, an intermediate appellate court of Missouri, in Beebe v. Columbia Axle Co., 233 Mo. App. 212, 117 S. W. 2d 624, l. c. 631, held.

> "As to the defendant's criticism that the contract in question was unilateral and lacking in mutuality so that neither party was bound thereby, it has been held that although a contract on its face and by its terms appears to be obligatory on one party only, yet, if it is the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation. Lewis v. Atlas Mut. Life Ins. Co., 61 Mo. 534; Glover v. Henderson, supra; 13 C. J., art. 180, p. 334.
>
> "The question, after all, is one of intention, to be gathered from the terms of the contract and the tenor thereof, considered in the light of the subject matter of which the contract deals.
>
> "In this case the contract was clearly one by which the defendant employed the plaintiff as salesman and distributor of its axles, which necessarily, when accepted by the plaintiff, imported a correlative obligation on his part to act as such salesman and distributor in the territory specified. An agreement to serve may be implied. 12 C. J., art. 180, supra. **The contract could be brought into existence only by virtue of the recognition by the parties of the correlative obligations of the one to the other. It was entered into upon a mu-**

tual understanding of the obligations to be assumed by each.'' (Emphasis ours.)

It was the duty of the Circuit Court of Appeals to have measured the nature of the extent and nature of respondent's obligation in the light of the Missouri law. It failed either to consider or to give effect to the Missouri law.

CONCLUSION.

Since, in a diversity case, the only law which a federal court may apply, within the limits of its power and authority under the Federal Constitution, is the entire body of the substantive law of the appropriate State, a scrupulous and meticulous inquiry into the appropriate State law would seem to be essential if the constitutional rights of the parties are to be observed.

When fundamental rights are asserted this Court, impelled by the solicitude it entertains for the protection of such rights, feels that it is incumbent upon it ''to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and in effect.'' Oyama v. State of California, 92 L. Ed. 257 (Adv. Opinions).

While it is true that neither the District Court nor the Circuit Court of Appeals undertook in **express** terms to deny that petitioner had the right, which it invoked throughout the proceedings, to have its rights determined in accordance and only in accordance with the appropriate State law, the action of the former in rendering judgment upon pleadings which made it impossible to ascertain the appropriate State law and without reference to the appropriate State law, and of the latter in affirming a judgment entered under such circumstances, was a denial of that right in substance and effect.

While it is true that the Circuit Court of Appeals in holding that it was immaterial whether the rights of petitioner were governed by the law of Missouri or by the law of Illinois did not in **express** terms deny the petitioner's claim that it was entitled to the benefit of all the substantive law of Missouri, its action in applying part of the substantive law of Illinois and in failing to give consideration to many important and material phases of the law of Missouri, was in substance and effect a denial of that right.

The course followed by the District Court and by the Circuit Court of Appeals involves a grave and serious departure from the principle established by this Court in the Erie case and steadfastly applied thereafter. As such it merits the consideration of this Court.

Respectfully submitted,

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SUPREME COURT OF THE [illegible]

OCTOBER TERM, 1942.

WM. J. LEMP BREWING COMPANY,
Petitioner,
v.
EMS BREWING COMPANY,
Respondent.
No. 854.

REPLY BRIEF OF PETITIONER.

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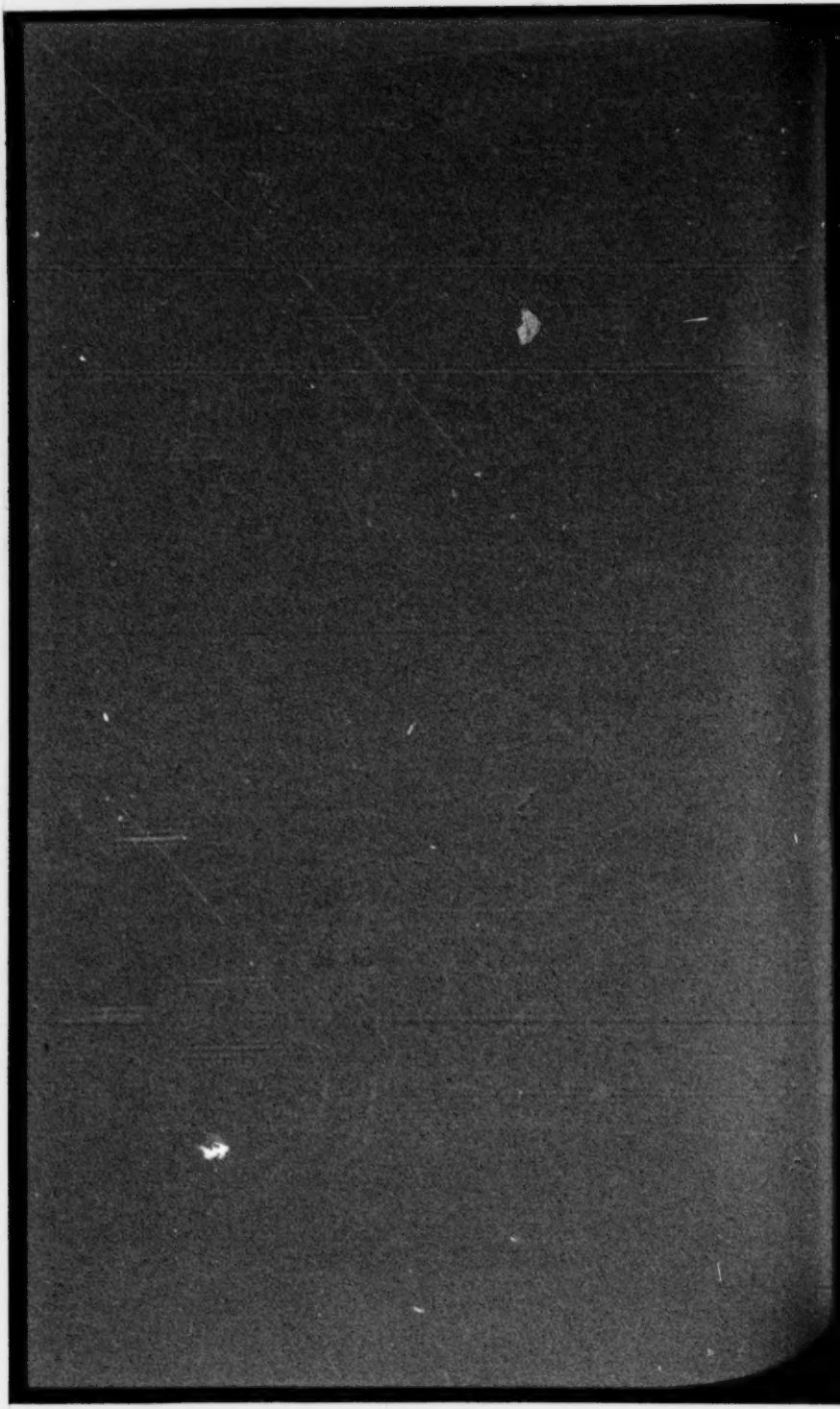

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Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

WM. J. LEMP BREWING COMPANY, Petitioner, v. EMS BREWING COMPANY, Respondent.	No. 634.

REPLY BRIEF OF PETITIONER.

I.

The Importance of the Questions Presented.

Respondent concedes that under the conflict of laws rule of Illinois the construction of the contract was governed by the law of the State where the contract was made, or, if the contract was to be wholly performed in one state by the law of the State where this performance was to occur, the respondent further concedes that the pleadings upon which it sought and obtained judgment did not disclose where the contract was executed or where it was to be performed.

In the light of these concessions the respondent could not, and it does not, take issue with petitioner's claim that the record upon which the judgment was based afforded no basis for the ascertainment of the appropriate State law.

Respondent urges this Court to refrain from exercising its discretionary power to review a judgment based upon such a record upon the ground that the litigation is private and that no important questions are involved.

We cannot deny that the litigation is private but in that respect it does not differ from the controversy that existed between Mr. Tompkins and the Erie Railroad Company. The liability of the Erie Railroad Company to Tompkins was not a matter of transcendent public interest but the **principle** upon which that liability was to be ascertained was a matter of grave importance.

We realize that the question of respondent's liability to petitioner is not per se a matter of concern to this Court but we submit that the evident, almost confessed, **departure** from the **principle** established by this Court is important.

To say, as does the respondent, that no important federal question is involved where a federal court enters a judgment in a diversity case under circumstances which made it impossible for that court to ascertain the appropriate State law is to ignore entirely the fact that this Court has declared it to be beyond the constitutional power of a federal court to decide questions of substantive law except in accordance with the appropriate State law.

The respondent has not cited a single authority sustaining the power and right of a federal court, since the decision in the Erie case, to enter a judgment where the record before the court fails to afford the basis for the ascertainment of the appropriate State law.

If the doctrine of the Erie case is to be qualified so as to permit District Courts in diversity cases to determine questions of substantive law upon pleadings which do not provide a basis for the ascertainment of the appropriate

State law, and so as to permit Circuit Courts of Appeals to affirm judgments upon a consideration of various potential State laws, the qualification should be only with the express approval of this Court.

II.

In a Federal Court Judgment on the Pleadings Cannot Be Based Upon a Presumption That the Governing Law Is the Law of the Forum.

Respondent advances a contention, not heretofore made either in the District Court or in the Circuit Court of Appeals, that since petitioner did not allege where the contract was made or where it was to be performed the federal court sitting in Illinois would be required to apply the common law of Illinois.

In this connection respondent cites Mutual Life Ins. Co. v. Divine, 180 Ill. App. 422, in which the court held that where the proof did not show where a contract was made and where there was neither allegation or proof of the law of another state, the common law would be applied in construing the contract.

Erie Railroad Co. v. Tompkins required federal courts to apply the substantive appropriate State law but did not require the federal courts to follow the State law in procedural matters.

Prior to Erie v. Tompkins the federal courts took judicial notice of the laws of all the States and it has been held that this rule has not been affected by the Erie decision.

Gallup v. Caldwell (C. C. A. 3), 120 F. 2d 90;
Alcara v. Jordeau (C. C. A. 3), 138 F. 2d 769.

In fact, the Circuit Court of Appeals in the case at bar has so ruled (R. 56).

Petitioner was not required to plead the law of Missouri and on the trial of the case would not have been required to make proof of the law of Missouri.

It was not necessary for the petitioner to plead that the contract was executed in Missouri or that it was to be performed in Missouri, since these allegations were not essential.

If respondent desired to have the pleadings show the place of execution or the place of performance it was at liberty to move the Court for a more definite statement or for a bill of particulars.

Respondent moreover was at liberty to file in conjunction with its motion for judgment on the pleadings an affidavit as to the place of execution or the place of performance. Petitioner then could have filed, if necessary, counter affidavits.

Obviously the respondent seeking judgment on the pleadings had the burden of showing his clear right to such judgment as a matter of law and since there can be no law in a diversity case other than "the appropriate State law" that burden could not have been met except upon proof by the respondent of the facts essential to a determination of the appropriate state law. The fact to be established was the place of execution of the contract or the place of performance coupled with proof that performance was to be confined to one state.

Respondent intimates (p. 14 Respondent's Brief) that the claim now asserted by petitioner is an afterthought. Yet in the opening paragraph of its brief respondent admits that the Statement of petitioner is substantially correct (p. 1 Respondent's Brief). In that statement so admitted to be substantially correct the petitioner asserted that it had advised the District Court in connection with its argument that any ruling on the motion would be pre-

mature "for the reason that the record did not disclose the place of execution of the contract" and that "under the pleadings plaintiff is at liberty to prove and expects to prove that in point of fact the contract was entered into in the City of St. Louis, Missouri," and that "Nothing on the face of the contract purports to limit its performance by any one of the parties to any one state" (pp. 6-7 Petition for Writ).

These statements are not challenged and cannot be challenged by the respondent because they were made at the outset in briefs served on the respondent and filed with the District Court.

It is said that petitioner did not seek to amend its pleading. Obviously the purpose of such an amendment would be to advise the District Court and the respondent of petitioner's position and claim. That had already been done in clear, unmistakable and unequivocal language.

Respondent with full knowledge of petitioner's claim pressed its motion for judgment on the pleading and the District Court with full knowledge thereof entered judgment for the respondent.

In its appeal from that judgment the petitioner in its statement of points reiterated its claim as follows:

> "4. The court erred in passing upon the sufficiency of the complaint without hearing evidence as to the place of execution of the contract referred to in the complaint and without making findings of fact based upon evidence as to the place of execution of said contract (R. 39).
>
> "5. The law applicable to the construction of the contract referred to in the complaint could not be determined and ascertained in the absence of proof

as to the place of the execution of the contract" (R. 39).

Petitioner from the outset has claimed that under the binding and controlling decisions of this Court its rights can be ascertained only in accordance with the appropriate State law; that the appropriate State law is the law of the State where the contract was executed; that it was beyond the power of the District Court to enter judgment upon the pleadings because the pleadings did not disclose where the contract was executed; that the action of the District Court and of the Circuit Court of Appeals have deprived petitioner of the right to have its case determined in accordance with the law of the land as declared by its highest court.

Petitioner's fundamental rights have been invaded by the judgment below and this Court's writ of certiorari should issue to review petitioner's claim.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

WM. J. LEMP BREWING COMPANY,
Petitioner,
v.
EMS BREWING COMPANY,
Respondent.
No. 634.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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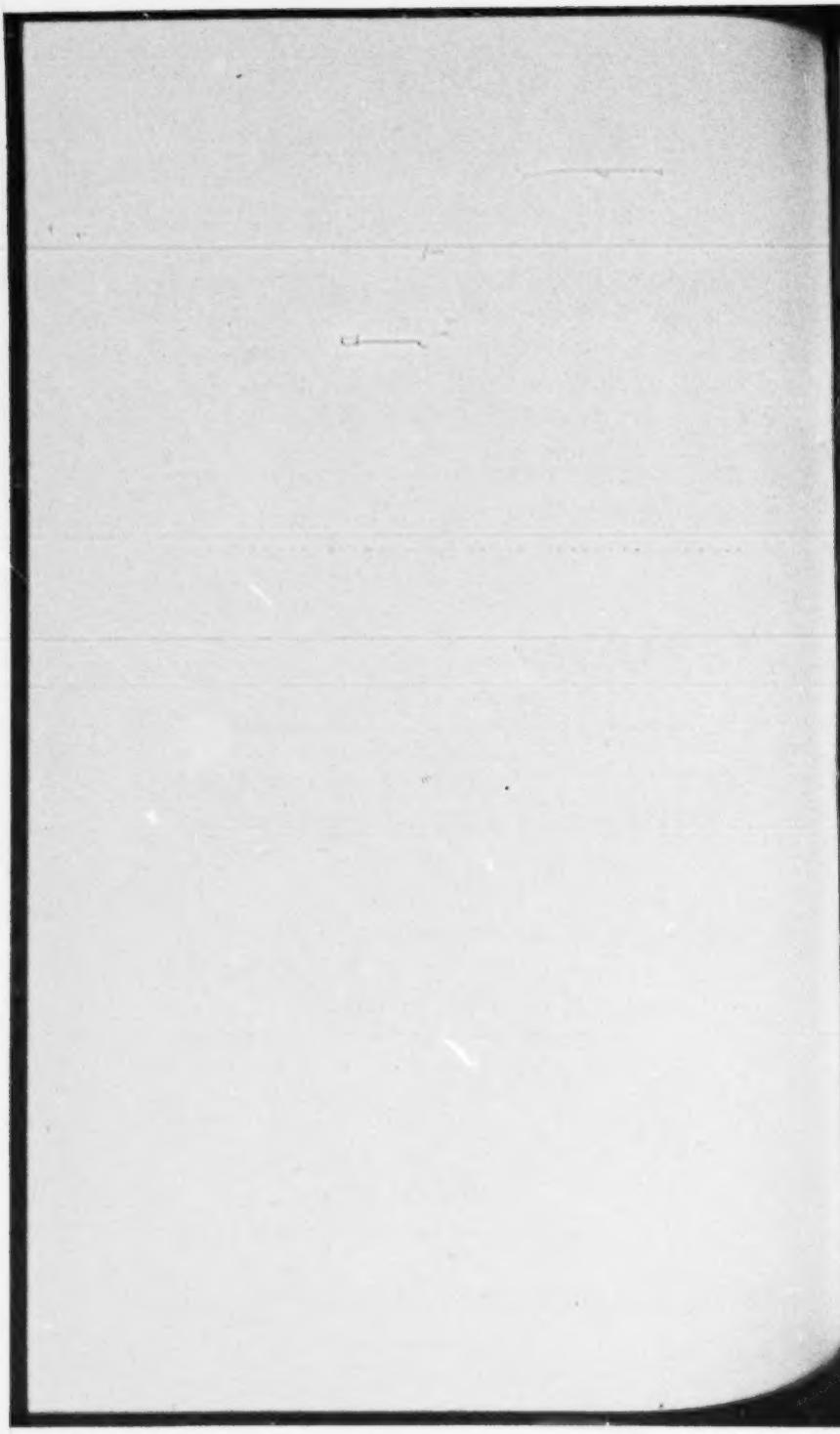

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Cases Cited.

Statute Cited.

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STATEMENT OF THE CASE.

The Statement of petitioner is substantially correct. However, there are certain relevant facts not sufficiently included in petitioner's Statement, to which we desire to call the attention of the court.

This is a suit upon a written contract dated August 25, 1939 (Rec. pp. 13-19), entered into by and between petitioner, a Missouri corporation, and William J. Lemp, now deceased, on the one part, and the former Central Breweries, Inc., an Illinois corporation, now dissolved, on the

other part. By successive assignments from said Central Breweries, Inc., respondent, an Illinois corporation, became a party to said contract.

Damages are claimed by petitioner because of respondent's claimed failure to continue to carry out the terms of said contract and to continue to pay royalties to petitioner under the terms of said contract.

By the Second part of the aforesaid contract (Rec. p. 14), petitioner gave to respondent its consent to use by respondent of the name "Lemp" in its corporate name and for its use in the production, sale or distribution of beer.

The Fourth part of said contract (Rec. p. 16) provided as follows:

> "Fourth:—First Party Agrees to pay Second Party upon beer manufactured, produced, and sold by it beginning November 1, 1939, royalties as follows:
>
> "(a) Fifty cents (50¢) per barrel on all beer (draught as well as bottled) brewed and sold by First Party under a corporate name including the name 'Lemp' and retailed at fifteen cents (15¢) per bottle or at a comparable price for draught beer, and five cents (5¢) per barrel on all beer in excess of ninety thousand (90,000) barrels per annum brewed and sold by First Party and retailed at ten cents (10¢) per bottle or at a comparable price for draught beer.
>
> "(b) In the event the only beer produced and sold by First Party under a corporate name including the name 'Lemp' is retailed at ten cents (10¢) per bottle, or at a comparable price for draught beer, First Party agrees to pay to Second Party as the sole and only royalty under this contract, twenty-five cents (25¢)

per barrel on all beer (draught as well as bottled) brewed and sold by First Party in excess of ninety thousand (90,000) barrels per annum."

The Eighth part of said contract (Rec. pp. 17-18) was as follows, to-wit:

"Eighth:—Second Party hereby grants to First Party the exclusive right, option, and privilege for a period of five (5) years from and after the date of this contract, to purchase at any time within said period all of the assets of Second Party, specifically including, without in anywise limiting the generality of the foregoing, this contract and all rights and privileges hereunder and the right to use the corporate name of Second Party and the good will of Second Party, for that number of shares of the common stock of First Party which is equivalent to thirty per cent (30%) of its then outstanding common stock, said thirty per cent (30%) of common stock to be issued out of presently or then authorized but unissued common stock of First Party.

"Second Party agrees that during the period the said option to First Party hereinabove granted shall be in force and effect, it will not sell, assign, transfer, or encumber its assets, or any of them, including this contract, or its corporate name, or its good will, or its rights to the use of the name 'Lemp,' except subject to the option herein granted to First Party, provided, however, that nothing herein contained shall be construed to deprive Second Party of the right to declare and pay out of its earnings, dividends to its stockholders."

SUMMARY OF ARGUMENT.

Petitioner has alleged that the United States Circuit Court of Appeals misapplied the Conflict of Law rule of the state of Illinois and also alleged that the Circuit Court of Appeals erred in holding it was immaterial whether the Missouri or Illinois law was applied by the court as the results would be the same.

The written contract upon which petitioner filed suit in the District Court in Illinois was clear, certain, unambiguous, and speaks for itself. The meaning of the contract is so clear that neither the District Court nor the Circuit Court of Appeals could have interpreted it in any different manner without doing violence to the written words of said contract. As neither the place where said contract was made nor the place where it was to be performed was alleged in the Complaint, the United States Circuit Court of Appeals, as its opinion shows, in answer to petitioner's intimation in its Brief and Argument that the contract was executed in Missouri, correctly found that the contract sued upon was terminable at will under the laws of either Missouri or Illinois. The words, royalties were to be paid on all beer brewed and sold under a corporate name including the name "Lemp," are so clear that no court anywhere could interpret them to mean that royalties were to be paid after the name of respondent was legally changed from "Lemp Brewing Co." to "Ems Brewing Co.," regardless of the laws of the state that would be applied in interpreting said written contract.

ARGUMENT.

Petitioner has alleged two grounds upon which it urges this court to issue its writ of certiorari. The first ground alleged is, that under the Conflict of Law Rule of Illinois the law of that state in which the contract was executed was the appropriate state law governing the construction of the contract and that the District Court had no power to grant respondent's motion for judgment upon the pleadings upon a record which did not disclose the place of execution of the contract. The second ground alleged is, that the Appellate Court erred in holding it was immaterial whether construction of the contract was governed by Missouri or Illinois law and that the Appellate Court did not search for and apply the entire body of the substantive law of Missouri.

There is no occasion for this court to exercise its discretionary power to review this private litigation. Jurisdiction in the District Court was solely by reason of diversity of citizenship; no federal statute and no federal question is presented. There is here no important question of local law, no question of conflict between decisions, and no question of departure from the accepted and usual course of judicial proceedings.

This is a dispute between two parties concerning the interpretation of a certain contract (Rec. pp. 13-19) and the manner in which that contract was terminated. The respondent contended that its obligation to pay royalties to the petitioner ended when respondent ceased to brew and sell beer under a corporate name including the name "Lemp." The respondent also contended that it could terminate the contract at any time after the expiration of five years from the contract's effective date. The

contract itself and the facts concerning the manner in which it was terminated were set forth in the petitioner's Complaint (Rec. pp. 2-19), and, on the basis of the contract and these facts, the District Court ruled as a matter of law that there could be no recovery by the petitioner (Rec. pp. 33-35), entering a judgment on the pleadings in favor of respondent (defendant below). This ruling was affirmed by the U. S. Circuit Court of Appeals for the Seventh Circuit (Rec. pp. 52-56), 164 F. (2d) 290.

The situation here is quite different from those involved in the case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188; Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290; New York Life Insurance Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329; Rosenthal v. New York Life Insurance Co., 304 U. S. 263, 82 L. Ed. 1330; Klaxon Company v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, and Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481, cited by petitioner. Here there was no failure to apply the common law of a state. Nor was there any question of general federal common law.

Petitioner in its Argument (pp. 22-23 of its Brief) relies on the case of Oakes v. Chicago Fire Brick Co., 388 Ill. 474 (l. c. 479), as follows: "Where there is nothing in the contract or in the proof to show where the contract is to be performed, it is governed by law of the place where made." But in the present case petitioner in its complaint did not allege where the contract was made nor where it was to be performed. As said by the Court of Appeals, petitioner has only contended in its Argument that the contract was made in Missouri. There is nothing in the record to show it. As said by the Appellate Court of Illinois in Mutual Life Ins. Co. v. Divine, 180 Ill. App. 422 (l. c. 425), which case has

never been overruled or distinguished by the Supreme Court of Illinois or by any other Appelalte Court of Illinois:

> "If it is not known where a contract is made then the common law must be applied in such construction."

And the common law that would be enforced in Illinois by a Federal Court sitting in Illinois would be the Illinois common law.

Erie R. Co. v. Tompkins, 304 U. S. 64 (l. c. 79).

The Circuit Court of Appeals answering petitioner's contentions that the law of Missouri governs in the interpretation of this contract, citing Missouri and Illinois cases, expressly found, contrary to the petitioner's contentions, that the contract would be terminable at will under the law of either state and that no question of conflict of laws is involved (Rec. p. 56). This finding conflicts with no case cited by the petitioner.

In the absence of showing any conflict, petitioner's position is untenable. Cases like Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481, do not support petitioner. The references to Missouri law in the opinion of the Circuit Court of Appeals are answer enough to the argument that that court erred in failing to search for and apply the entire body of the substantive law of Missouri. Petitioner has presumably engaged in such a search, but no contract interpretation case cited does more than rule upon the particular contract involved. None of them purports to rule upon a contract identical, or even similar, to the one involved in this case and a study of all of them will not reveal any principle which was overlooked by the courts below.

The petitioner beclouds the issues by an extensive argument about the principles of conflict of laws when, in fact, no conflict exists. Petitioner would have this court consider such principles in the abstract and ignore the fact that they do not apply to the particular matter at hand.

There is nothing doubtful or obscure about the terms of this contract as to which the laws of various states which had a relationship to the controversy might differ. There are no principles to which the courts below could turn in determining the question of whether or not the contract was clear and unambiguous. The contract itself must determine this. The District Court did exactly what the Complaint required it to do: it interpreted the contract and found it clear and unambiguous. It found that, after five years from the time it went into effect, if the option provided therein was not exercised, the contract was terminable at will by either party; that the notice of termination given by the respondent of its purpose to terminate was not only reasonable in length of time but went beyond any requirement of the contract; that the economic condition of the country as affected by availability or nonavailability of materials and equipment necessary for petitioner to begin and carry on the business of manufacturing beer at the time of said notice is immaterial in view of the terms of the contract; that respondent at the time it gave notice of the termination of the contract, which was after said five-year option period, was under no obligation to continue the manufacture and sale of beer under the name of "Lemp" or under a corporate name of which the name "Lemp" was a part; was not precluded from changing its corporate name to a name of which the name "Lemp" formed no part; was not precluded from manufacturing and selling beer under any other name it might choose, and was under no obligation to pay royalties to petitioner upon any beer manufactured and sold under any

name other than "Lemp" or which did not include the name "Lemp" (Rec. p. 34).

The Circuit Court of Appeals, in reaching the same conclusion, found that the language used in the contract is certain, unambiguous, and speaks for itself (Rec. p. 55).

Petitioner ignores the fundamental principle of contract law that when a contract's language is certain and unambiguous the contract speaks for itself. Under such circumstances its interpretation is solely for the court before whom the suit is brought.

> Hines v. Ward Baking Co., 155 F. (2d) 257 (Seventh Circuit).

Likewise, where the language of a contract is clear and unambiguous, questions as to the admissibility of extraneous evidence have no relevance. As found by the Trial Court and Circuit Court of Appeals, there is no ambiguity in the contract here sued upon. The Court of Appeals in its opinion (Rec. p. 55) said:

> "The language used in the contract is certain, unambiguous, and speaks for itself. The contract does not disclose any language expressing an intention of the parties that the contract should continue in perpetuity, and nowhere in the contract is there any time fixed during which the contract is to continue in force, except as we have already noted,—that Central was granted an option for a period of five years to purchase all of plaintiff's assets, and that plaintiff agreed that during this period of five years it would not sell its assets or its rights to the use of the name 'Lemp.' "

The Missouri courts, like the courts of Illinois, adhere to the well established rule that where there is nothing am-

biguous in the language of a contract, the court's duty is to construe the contract as written.

Tant v. Gee (1941), 154 S. W. (2) 745, 348 Mo. 633;
Illinois Fuel Co. v. Mobile & O. R. Co. (1928), 8 S. W. (2) 834, 319 Mo. 899;
Whiting v. St. Louis & S. F. R. Co. (1887), 28 Mo. App. 103;
Kansas City Life Ins. Co. v. Wells (C. C. A. 8, 1943), 133 F. (2) 224;
Green v. Ashland State Bank, 346 Ill. 174 (l. c. 182);
Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429 (l. c. 433);
Domeyer v. O'Connell, 364 Ill. 467.

"The general rule is that the construction of contracts is for the court and not the jury."

Rode v. Gonterman, 41 F. (2d) 1;
Schneider v. Neubert, 226 Ill. App. 84, affirmed 308 Ill. 40.

In this contract there is nothing which is not clear. Royalties were to be paid to petitioner "on all beer (draught as well as bottled) brewed and sold by First Party under a corporate name including the name 'Lemp'" (Clause Fourth of the Contract, Rec. p. 16). There is no occasion whatever for the admission of extraneous evidence in view of this wording and there would be no justification for admitting any under the law of the State of Missouri. The contract clearly shows the intention of the parties that it could be terminated at will at any time after the five-year option period. There was no irrevocable consideration given by petitioner in this case, nor any independent additional consideration. All petitioner did, as shown by the allegations of the complaint, paragraph 10, Count I (Rec. pp. 10-11), was to consent to use by Central of the name "Lemp", provided such use was incidental to the

production, sale or distribution of beer, and to consent to "Lemp" becoming a part of Central's corporate name.

In the case of Paisley v. Lucas, 346 Mo. 827, 143 S. W. (2d) 262, the contract considered was held to be terminable at the will of either party, and the Missouri Supreme Court stated the prevailing view in Missouri as follows, 346 Mo., l. c. 842:

> "The applicable rule of law is well stated in the case of James Maccalum Printing Co. v. Graphite Compendius Company, 150 Mo. App. 383, 391, 392, 130 S. W. 836, 838, as follows: 'The courts are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation. Yet it seems to be the law in this state that, where the intention to do this is unequivocally expressed, the contract will be upheld. (Citing cases.) But in this jurisdiction, as in others, courts will only construe a contract to impose an obligation in perpetuity when the language of the agreement compels that construction.' * * * "

Under the Fourth part of the contract sued on relating to payments of royalties (Rec. p. 16), royalties were to be paid only for beer brewed and sold under a corporate name including the name "Lemp". The respondent is an Illinois corporation, as shown by the complaint (Rec. p. 3). As such corporation, both Central and respondent had the undoubted right to change their name at any time as such right is given by the statutes of the state of Illinois (ch. 32, Par. 157.52 [a] Ill. Rev. Stat. 1945), and which said act has been in full force and effect since 1933. Petitioner signed said contract knowing, or being presumed to know, of such statutory right, but knowing the same, did not have Central Breweries waive said right by terms of said contract of August 25, 1939. Said contract bound respond-

ent to pay royalties on beer brewed and sold under a corporate name including the name "Lemp". There is not a word in said contract requiring the payment of royalties under any other corporate name. As respondent had a legal right to change its name, as petitioner knew of said right, as royalties were only to be paid on beer brewed and sold only under a corporate name including the name of "Lemp", when the name of respondent was changed from "Lemp" to "Ems" said contract required no further payment of royalties to petitioner and petitioner, therefore, suffered no damages because of respondent's failure to pay any further royalties.

Part Eighth of the contract (Rec. pp. 17-18), bound petitioner only for five years, the option period granted in said part of the contract, not to sell, assign, transfer or encumber its assets, or any of them, including this contract, or its corporate name, or its good will, or its rights to the use of the name "Lemp", except subject to the option therein granted. Said inhibitions expired after said five-year period and expired prior to the termination of the contract by respondent.

Petitioner raises the point as to whether the termination notice given by respondent was reasonable, a question which was considered by the District Court (Rec. p. 34). Petitioner states that the Circuit Court of Appeals did not discuss or refer to the question of reasonable notice (petitioner's Brief p. 37). The record shows that that court did refer to it (Rec. p. 54).

The District Court further considered petitioner's argument about War Food Administration Order No. 66 and found that the economic condition of the country as affected by availability or non-availability of materials and equipment necessary for petitioner to begin and carry on the business of manufacturing of beer at the time of the

termination notice is immaterial in view of the terms of the contract (Rec. p. 34). Petitioner's Complaint contains no allegation that petitioner ever had engaged in the brewery business prior to August 25, 1939, the date of entering into the contract between petitioner and Central Breweries and the Complaint contains no allegation that petitioner had any such intention.

Such arguments, relating to points considered by the courts below in the light of the pleadings and the contract, are not the type which this court should consider in passing upon a Petition for Writ of Certiorari, particularly where action taken by respondent has not been shown to be governed by any local decision. Some cases are cited by petitioner which purport to require reasonable notice under their particular facts. The District Court here held that the notice given by respondent was reasonable (Rec. p. 34).

Neither this contract nor any similar contract has ever been interpreted by any court of Missouri, Illinois, or any other state, as far as we can find, prior to its interpretation by the District and Appellate Courts in this case. There was, therefore, no decisive authority anywhere on its interpretation. As noted above, the United States Circuit Court of Appeals did make a search of the Missouri substantive law relating to the construction of this contract as well as the law of Illinois because "plaintiff intimates that the contract was executed in Missouri" (Rec. p. 56). The Court of Appeals found that the contract would be terminable at will under the law of either state (Rec. p. 56).

The wording of the contract sued upon is so clear and so certain that we do not believe any court anywhere could interpret said contract so as to require respondent to pay royalties to petitioner after it had changed its corporate name from "Lemp" to "Ems" Brewing Co.

and had ceased brewing "Lemp" beer and, not being liable to petitioner for royalties, petitioner suffered no damages for which respondent could be held liable.

There can be no doubt but that the petitioner, when it filed this suit, expected the contract and the facts alleged in its Complaint to speak for themselves. At that time petitioner considered the place of execution as being of so little importance that petitioner neglected even to allege it in the Complaint. At no subsequent time has petitioner sought to amend its pleading in this respect. But, now that the courts have exercised their function, interpreted the contract, and ruled that petitioner has no cause of action thereunder, the petitioner is grasping at this straw created by petitioner's own omission.

Nothing would be accomplished except delay if the District Court were required to hear testimony as to place of execution and place of performance. Once it had been heard, the District Court would be faced with the same duty which it has already fulfilled: to interpret the contract according to its terms. This court should not exercise its discretion to effect any such result.

CONCLUSION.

The record clearly shows that the courts below discharged all their duties in the premises. They concluded that, since the contract is clear and unambiguous, it should be interpreted according to its terms. They then proceeded to interpret it, as the common law of any state would require. Such procedure involves no departure from the usual course of judicial proceedings, nor does the result, which is limited to the particular contract before the court, give rise to any important question or conflict with any decided case.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the Petition for a Writ of Certiorari should be denied.

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